Sazali bin Abdullah v Ketua Polis Negeri Perak & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–107 OF 1999
VT SINGHAM J
21 DECEMBER 2006

Labour Law — Employment — Dismissal — Employee a police constable — Whether defending officer should be permitted to remain in the Orderly Room enquiry with plaintiff from the start of the enquiry until its conclusion — Whether adjudicating authority misunderstood or misread its role to that of a prosecuting officer in a criminal trial or in a court of law — Whether there was breach or excess of jurisdiction — Whether there was breach of the rules of natural justice — Whether charge against plaintiff ambiguous — Whether plaintiff given an opportunity to explain on his alleged previous misconduct of the plaintiff which the adjudicating authority had taken into consideration in meting out the punishment of dismissal against the plaintiff — Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 reg 5(1), 6(10)

The plaintiff who was a police constable of the Royal Malaysian Police Force at the Police Station Kampar was dismissed from the force under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations') for breach of the Inspector General of Police standing orders 66/11 dated 11 October 1979 where the preliminary urine test by the hospital laboratory in Batu Gajah stated that it did not contain morphine and the word cannabis had been deleted. However, the chemist report stated it contained 'Delta-9 Tetrahydrocannabinoid Carboxylic Acid'. The plaintiff was informed by the Chief Police Officer Perak of the proposed disciplinary proceeding to be held under the Regulations. The disciplinary proceeding was then conducted by way of Orderly Room enquiry. At the close of the enquiry, the plaintiff was dismissed from the force. The Orderly Room enquiry was conducted by the then OCPD of Ipoh who was delegated by the Police Service Commission to take disciplinary action against the plaintiff under the Regulations ('the adjudicating authority'). At the enquiry, the plaintiff was represented by a Chief Inspector as the defending officer as provided under the Regulations ('the defending officer'). The plaintiff being dissatisfied with the decision of the adjudicating authority filed the writ of summons against the Ketua Polis Negeri Perak, Ketua Polis Negara Malaysia and Kerajaan Malaysia as the first, second and third defendants respectively. The plaintiff's complaints, inter alia, were as follows: (a) the disciplinary proceeding which was taken against the plaintiff was in breach of the Drug Dependant (Treatment and Rehabilitation) Act 1983 and the Constitution of Malaysia; (b) there was a breach of the Regulations; (c) there was a breach of the rules of natural justice thus rendering the plaintiff's dismissal null and void, ineffective and of no consequence; and (d) the plaintiff was not given an opportunity to make a plea of mitigation before the punishment of dismissal was imposed upon him.

Held, allowing the plaintiff's claim:

(1) Once a police officer is permitted by the adjudicating authority under the Regulations to represent the plaintiff who was facing the disciplinary action, the process demands that the defending officer should be permitted to remain in the Orderly Room enquiry with the plaintiff right from the very beginning of the enquiry until its conclusion. If it is otherwise or it is at the mercy or whims and fancies of the adjudicating authority as it happened in the instant case, it will then defeat the whole purpose of the representation as envisaged by the Regulations and would make the representation worthless and to be of no effect. Consequently, and on the admitted breach of the Regulations which is to be read with reg 6(10) of the Regulations, there was a clear breach of reg 5(1) of the Regulations (see paras 15, 17).

(2) The function of the adjudicating authority at the Orderly Room enquiry is to examine, discover the truth and if necessary, may question any witness at any time and then make his finding and certainly cannot act as a prosecuting officer to establish the charge or a case against the plaintiff. The role of the adjudicating authority should not be misunderstood or misread to that of a prosecuting officer in a criminal trial or in a court of law even assuming he is authorized to act as a prosecuting officer which is not the case in the instant case as it is not provided in the Regulations. His function is not to establish the charge but to examine the evidence and to make a finding. There was a clear admitted breach or excess of jurisdiction on his function as the adjudicating authority. An adjudicating authority should also not take sides by being a judge and a prosecuting officer as this would open to severe criticism of biasness (see para 18).

(3) The charge of an alleged previous misconduct was not properly before the adjudicating authority. Therefore, there was a clear breach of the rules of natural justice especially when it involves the deprivation of a livelihood. The adjudicating authority cannot allow the enquiry to start ex parte and impose the punishment ex parte after taking into account an alleged previous misconduct which was not properly before him where the adjudicating authority took into account behind the plaintiff's back an alleged previous misconduct (see para 21).

(4) The charge which was the basis of the Orderly Room enquiry appeared to be ambiguous in view of the conflicting findings by the hospital laboratory at Batu Gajah and the chemist report. Rightfully, the entire case appears to be a non-starter because the alleged drug which was found in the urine of the plaintiff, namely 'Delta-9 Tetrahydrocannabinoid Carboxylic Acid' was first, according to the adjudicating authority, not a scheduled drug under the Dangerous Drug Act 1952. Secondly, the Form To Confirm the drugs in the urine which was relied on in support of the charge stated the urine did not contain morphine and the word 'mengandungi' and 'cannabis' were also deleted which obviously tended to show that no drugs were found in the urine especially cannabis which is the subject matter of the charge (see para 27).

(5) There was in evidence that at no time was the plaintiff informed or afforded an opportunity to explain or comment on the alleged previous misconduct of

which the adjudicating authority had taken into consideration in meting out the punishment of dismissal against the plaintiff. This was a case of the adjudicating authority having taken into consideration matters behind the back of the plaintiff which was a clear breach of the rules of natural justice where it was grossly unfair and against the charge (see para 30).

[Bahasa Malaysia summary

Plaintif yang merupakan seorang konstabel polis Angkatan Polis di-Raja Malaysia di Stesyen Polis Kampar telah dipecat daripada pasukan tersebut di bawah Peraturan-Peraturan Polis (Kelakuan dan Displin) (Pegawai Polis Junior dan Konstabel) 1970 ('Peraturan tersebut') kerana melanggar arahan 66/11 Ketua Polis bertarikh 11 Oktober 1979 di mana ujian awal kencing oleh makmal hospital di Batu Gajah menyatakan bahawa ia tidak mengandungi morphine dan perkataan cannabis telah dipotong. Bagaimanapun, laporan ahli kimia menyatakan ia mengandungi 'Delta-9 Tetrahydrocannabinoid Carboxylic Acid'. Plaintif telah dimaklumkan oleh Ketua Pegawai Polis Perak tentang prosiding tatatertib yang dicadangkan akan diadakan di bawah Peraturan tersebut. Prosiding tatatertib tersebut telah diadakan melalui siasatan Orderly Room. Di akhir siasatan, plaintif telah dipecat daripada pasukan tersebut. Siasatan Orderly Room telah dikendalikan oleh OCPD Ipoh pada masa itu yang telah diarahkan oleh Suruhanjaya Perkhidmatan Polis untuk mengambil tindakan tatatertib terhadap plaintif di bawah Peraturan tersebut ('badan berkuasa membuat keputusan'). Dalam siasatan, plaintif telah diwakili oleh seorang Cif Inspektor sebagai pegawai yang membela seperti yang diperuntukkan di bawah Peraturan tersebut ('pegawai pembela'). Plaintif berasa tidak puas hati dengan keputusan badan berkuasa membuat keputusan tersebut dan memfailkan writ saman terhadap Ketua Polis Negeri Perak, Ketua Polis Negara Malaysia dan Kerajaan Malaysia sebagai defendan-defendan pertama, kedua dan ketiga masing-masingnya. Aduan plaintif, antara lain, adalah seperti berikut: (a) prosiding tatatertib yang diambil terhadap plaintif melanggar Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 dan Perlembagaan Malaysia; (b) terdapat pelanggaran Peraturan tersebut; (c) terdapat pelanggaran keadilan asasi yang mengakibatkan pemecatan plaintif tidak sah dan terbatal, tidak efektif dan tiada kesan; dan (d) plaintif tidak diberikan peluang membuat rayuan peringanan sebelum hukuman pemecatan dikenakan ke atasnya.

Diputuskan, membenarkan tuntutan plaintif:

(1) Apabila seorang pegawai polis dibenarkan oleh badan berkuasa membuat keputusan di bawah Peraturan tersebut untuk mewakili plaintif yang berhadapan dengan tindakan tatatertib, proses tersebut menuntut pegawai pembela dibenarkan berada dalam siasatan Orderly Room dengan plaintif dari mula hingga akhir siasatannya. Jika berlaku sebaliknya atau atas belas kasihan atau kehendak hati badan berkuasa membuat keputusan sebagaimana dalam kes ini, ia tidak menepati tujuan keseluruhan representasi tersebut seperti yang dibayangkan dalam Peraturan tersebut dan menjadikan Peraturan tersebut tidak berguna dan tiada kesan. Berikutan itu, dan berdasarkan pelanggaran

A Peraturan tersebut yang dinyatakan hendaklah dibaca bersama peraturan 6(10) Peraturan tersebut, terdapat pelanggaran peraturan 5(1) Peraturan tersebut 1yang nyata (lihat perenggan 15, 17).

(2) Fungsi badan berkuasa membuat keputusan dalam siasatan Orderly Room adalah untuk memeriksa, mendapatkan kebenaran dan jika perlu, boleh B menyoal mana-mana saksi pada bila-bila masa dan kemudian membuat penemuannya dan semestinya tidak boleh bertindak sebagai pegawai pendakwa untuk membuktikan pertuduhan atau kes terhadap plaintif. Peranan badan berkuasa membuat keputusan tidak harus disalahertikan atau disalahtafsirkan sebagai pegawai pendakwa dalam suatu perbicaraan jenayah C atau dalam mahkamah undang-undang jikapun beranggapan beliau mempunyai kuasa untuk bertindak sebagai pegawai pendakwa di mana bukanlah sedemikian dalam kes ini kerana ia tidak diperuntukkan dalam Peraturan tersebut. Fungsi beliau bukanlah untuk membuktikan pertuduhan tetapi untuk memeriksa keterangan dan membuat penemuan. Jelas terdapat pelanggaran yang berlaku atau bidang kuasa yang melampau dalam fungsinya D sebagai badan berkuasa membuat keputusan. Suatu badan berkuasa membuat keputusan juga tidak sepatutnya memihak kepada sesiapa dengan menjadi hakim dan pegawai pendakwa kerana ini akan mengakibatkan kritikan berat sebelah (lihat perenggan 18).

(3) Pertuduhan suatu salah laku yang dikatakan sebelumnya tidak betul E di hadapan badan berkuasa membuat keputusan. Oleh itu, terdapat pelanggaran yang nyata terhadap keadilan asasi khususnya apabila ia melibatkan mata pencarian dinafikan. Badan berkuasa membuat keputusan tidak boleh membenarkan siasatan dimulakan ex parte dan mengenakan hukuman ex parte setelah mengambilkira salah laku yang dikatakan F sebelumnya yang tidak dihadapkan dengan betul di hadapannya di mana badan berkuasa telah membuat keputusan mengambilkira salah laku yang dikatakan sebelumnya tanpa pengetahuan plaintif (lihat perenggan 21).

(4) Pertuduhan yang menjadi asas siasatan Orderly Room kelihatan tidak jelas kerana terdapat penemuan yang bercanggah oleh makmal hospital di Batu G Gajah dan laporan ahli kimia, Sewajarnya, keseluruhan kes kelihatan tidak boleh dimulakan kerana dadah yang dikatakan ditemui dalam air kencing plaintif, iaitu 'Delta-9 Tetrahydrocannabinoid Carboxylic Acid' adalah pertamanya, menurut badan berkuasa membuat keputusan bukan dadah berjadual di bawah Akta Dadah Berbahaya 1952. Keduanya, Borang H Pengesahan dadah dalam air kencing itu yang digunakan untuk menyokong pertuduhan menyatakan air kencing tersebut tidak mengandungi morphine dan perkataan 'mengandungi' and 'cannabis' juga dipotong yang mana cenderung untuk menunjukkan bahawa tiada dadah ditemui dalam air kencing tersebut khususnya cannabis yang merupakan perkara pokok pertuduhan tersebut (lihat perenggan 27).

I (5) Terdapat keterangan bahawa plaintif tidak pada bila-bila masa dimaklumkan atau diberikan peluang untuk menjelaskan atau memberi komen tentang salah laku yang dikatakan sebelumnya itu yang mana badan berkuasa membuat keputusan telah pertimbangkan dalam menjatuhkan hukuman pemecatan terhadap plaintif. Ini adalah kes di mana badan berkuasa membuat keputusan

setelah membuat pertimbangan tanpa pengetahuan plaintif yang merupakan pelanggaran jelas rukun keadilan asasi yang mana ia amatlah tidak adil dan bercanggah dengan pertuduhan tersebut (lihat perenggan 30).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 920–953.

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169 (refd)
De Verteuil v Knaggs (1918) AC 557; (1985) 159 CLR 550 (refd)
Delhi Transport Copr DTC Mazdor Congress & Ors (1991) Supp 1 SCC 600 (refd)
Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors [1997] 2 MLJ 454 (refd)
General Medical Council v Spackman [1943] AC 629 (refd)
Hamdan Ibrahim v Lembaga Tatertib Hospital Kuala Kangsar & Anor [2001] 1 CLJ 342 at p 360 (refd)
Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor [2002] 3 MLJ 714 (refd)
Johnson & Co (Building) Ltd v Minister of Health [1947] 2 All ER 395 (refd)
Kiau v West (1985) 159 CLR 550 (refd)
Krishna Murthy v Abdul Subban (1965) 1 Cr LJ 565 (refd)
Mohd Din Talip v Polis Diraja Malaysia [2004] 4 CLJ 804 (refd)
Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor [2001] 2 MLJ 257 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308 (refd)
Scmidst v Secretary of State of Home Affairs [1969] 2 ChD 149 (refd)
State Bank of Patiala v SK Sharma AIR 1996 SC 1669 (refd)
Shamsiah bte Ahmad Sham v Public Services Commissions, Malaysia & Anor [1990] 3 MLJ 364 (refd)
Solevee v Balkom 330; US 9 (1950) (refd)
Subry Hamid v Husaini Tan Sri Ikhwan & Anor [2006] 6 MLJ 229 (refd)
Suresh Koshi George v University of Kerala AIR 1969 SC 198 (refd)
Suwarna Transport Co Ltd, Appellant v Appellate Authority AIR 1956 Nag 235 (refd)
Triambak Pati Tripathi v BHS Education Allahabad AIR 1973 All 1 (refd)
Vassiliades v Vassiliades AIR 1945 PC 38 (refd)

Legislation referred to

Dangerous Drug Act 1952
Dangerous Drugs (Treatment and Rehabilitation) Act 1983
Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 regs 5(1), 6(3), (4), (7), (9), (10)

Surjan Singh (Surjan Singh Sidhu & Co) for the appellant.
Mohd Asnawi bin Abu Hanipah (Farhani bte Ahmad Tajuddin dan Suzana bte Atan with him) (Senior Federal Counsels, Attorney General's Chambers) for the respondent.

VT Singham J:

[1] In this case, the plaintiff who was a police constable of the Royal Malaysian Police Force at the Police Station Kampar was dismissed from the force with effect from 30 March 1996 under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations') for breach of the Inspector General of Police standing orders 66/11 dated 11 October 1979 where the preliminary urine test by the hospital laboratory in Batu Gajah stated that it did not contain morphine and the word cannabis has been deleted (see exh P3). However, the chemist report stated it contained 'Delta-9 Tetrahydrocannabinoid Carboxylic Acid' (see exh P4).

[2] The charge against the plaintiff is as follows:

> Bahawa anda sebagai seorang Konstabel di dalam Pasukan Polis Diraja Malaysia, pada ketika itu berkhidmat di Balai Polis Kampar di dalam Daerah Kinta, dalam Kontinjen Perak, pada 1 Februari 1994 jam 12.25 petang di Hospital Daerah Batu Gajah, anda telah melakukan satu kesalahan tatatertib, iaitu ingkar perintah Ketua Polis Negara bilangan KPN 66/11 bertarikh perintah 11 Oktober 1979 di mana hasil ujian awalan air kencing anda bagi mengesan penyalahgunaan dadah terhadap diri anda telah didapati mengandungi 'CANNABIS' dan hasil ujian penentuan oleh Ahli Kimia, Jabatan Kimia Malaysia Ipoh, pada 9 Apeil 1994 Nombor Makmal (Ip)1491/94, mengesahkan kandungan air kencing anda mengandungi 'DELTA-9 TETRAHYDROCANNABINOL CARBOYXLIC ACID' iaitu salah satu daripada jenis dadah yang dijadualkan di jadual pertama Akta Dadah Merbahaya 1952 (Akta 234), di mana perbuatan anda itu adalah tidak mematuhi arahan Ketua Polis Negara bilangan KPN 66/11 bertarikh 11 Oktober 1979, yang melarang anggota polis terlibat dalam penyalahgunaan dadah kerana menjejaskan imej Pasukan dan mengancam keselamatan Negara, dan oleh yang demikian itu anda telah melakukan kesalahan tatatertib di bawah peraturan 2(7) Peraturan-Peraturan Polis(Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970, PU(A) 86 bertarikh 24 Februari 1970 dan PU(A) 56 (Pindaan) bertarikh 8 Februari 1984 dan boleh dihukum dibawah peraturan yang sama.

[3] By a letter dated 14 October 1995, the plaintiff was informed by the Chief Police Officer Perak of the proposed disciplinary proceedings to be held under the said Regulations. The disciplinary proceedings was then conducted by way of Orderly Room enquiry on 7 November 1995, 8 November 1995, 15 November 1995, 29 March 1996 and 30 March 1996. At the close of the enquiry, the plaintiff was dismissed from the force with effect from 30 March 1996.

[4] The Orderly Room enquiry was conducted by the then OCPD of Ipoh, Mr R Nadanarajah who was delegated by the Police Service Commission to take disciplinary action against the plaintiff under the said Regulations. The plaintiff was permitted to be represented at the enquiry by a police officer not above the rank of Mr R Nadanarajah, the adjudicating officer whose rank was Assistant Commissioner of Police ('the adjudicating authority').

[5] The enquiry was conducted on 7 November 1995, 8 November 1995, 15 November 1995, 29 March 1996 and 30 March 1996. At the conclusion of the

enquiry, the plaintiff was found guilty of the charge and dismissed. The plaintiff being dissatisfied with the decision of the adjudicating authority filed the writ of summons on 30 March 1999 at the High Court, Ipoh against the Ketua Polis Negeri Perak, Ketua Polis Negara Malaysia and Kerajaan Malaysia as the first, second and third defendants respectively. The defendants were represented by a federal counsel of the Attorney General's Chamber. In this case, there were four different federal counsels who represented the defendants until the conclusion of the trial in this court.

[6] At the Orderly Room enquiry, the following documents were tendered in support of the charge:

(i) an undated letter with a copy of the charge from the adjudicating authority, Mr R Nadanarajah the OCPD of Ipoh informing the plaintiff of the Orderly Room enquiry and that Mr R Nadanarajah was delegated by Police Service Commissions to take disciplinary action against the plaintiff and marked as exh P1A-C;

(ii) the Application Form To Confirm the drug in the urine dated 2 February 1994 and marked as exh P3;

(iii) the chemist report dated 9 April 1994 marked as exh P4 from Ms.Lam Yoke Cheng;

(iv) letter dated 11 October 1979 from the Service Department of Police Headquarters Kuala Lumpur and addressed to the Chief Police of Perak enclosing a copy of the Service Circular No 9 of 1979 with regards to the Government Officers who are found to be involved in the abused of drugs marked as exh D6;

(v) the handwritten notes of evidence which was recorded by the adjudicating authority and marked as exh D7.

In addition to the above mentioned documents, ten witnesses were called to testify at the Orderly Room enquiry. The ten witnesses did not give oral evidence but a pre-prepared statement which was already in the possession of the adjudicating authority was tendered at the enquiry. At the enquiry, the plaintiff was represented by a police officer, Chief Inspector T Sivanganam as the defending officer as provided under the Regulations ('the defending officer').

[7] In this matter, the plaintiff's complaints inter alia are as follows:

(i) the disciplinary proceeding which was taken against the plaintiff was in breach of the Drug Dependant (Treatment and Rehabilitation) Act 1983 and the Constitution of Malaysia;

(ii) there was a breach of the said Regulations;

(iii) there was a breach of the rules of natural justice thus rendering the plaintiff's dismissal null and void, ineffective and of no consequence;

(iv) the plaintiff was not given an opportunity to make a plea of mitigation before the punishment of dismissal was imposed upon him.

As a result, the plaintiff has suffered loss and damage and therefore claimed for the following reliefs against the defendants

(i) a declaration that the first defendant had acted in breach of the said Regulations;

(ii) the plaintiff's dismissal from the Royal Malaysian Police Force is against the established rules of natural justice;

(iii) the dismissal of the plaintiff from the Royal Malaysian Police Force by the first defendant on 30 March 1996 is null and void, ineffective and of no effect and that the plaintiff is still a member of the Royal Malaysian Police Force;

(iv) an order that an account be taken of all salaries, enumeration and other benefits the plaintiff is entitled to and the same be paid to him thereto;

(v) damages;

(vi) interest on the sum awarded;

(vii) costs.

[8] On the other hand, the defendants have inter alia pleaded that the enquiry was carried out properly and in accordance with the Regulations.

[9] In the course of the trial in this court, learned federal counsel conceded and was also admitted by the adjudicating authority (DW1) that 'Delta-9 Tetrahydrocannabinoid Carboxylic Acid' being the drug as stated in the charge was not a scheduled drug under the Dangerous Drugs Act 1952 at the material time.

[10] As to the manner in which the Orderly Room enquiry was conducted, the adjudicating authority admitted in his evidence in this court to the following

(i) The defending officer was not allowed to be present at the enquiry right from the beginning but was only called in about 5-10 minutes later, after the proceedings had started on each date of the enquiry.

(ii) The defending officer did not witness the reading of the charge to the plaintiff and if the plaintiff was informed of the consequences if he was to be found guilty. Out of the five sessions of the Orderly Room enquiry on 7 November 1995, 8 November 1995, 15 November 1995, 29 March 1996 and 30 March 1996, the notes of proceedings do not show whether the defending officer was present on the second day of the enquiry, on 8 November 1995.

(iii) The defending officer was called into the orderly room only after the adjudicating authority had recorded the plea of the plaintiff and the defending officer did not know what had transpired as it had already been recorded before the defending officer entered into the orderly room.

(iv) The adjudicating authority did not record that the case had been made out against the plaintiff due to an oversight as required under reg 6(4) of the Regulations which expressly requires the adjudicating authority to make such finding against the plaintiff before the plaintiff is called to state his defence.

(v) He had with him the pre-recorded statement of the ten witnesses who were called to establish the charge which is not included in the notes recorded by him and tendered at this trial and marked as defence's exh D7.

(vi) He did not record the requirement of reg 6(9) of the said Regulations when he read the pre-recorded statements to the witnesses, ie he did not record the endorsement which is as follows:

> Read over to the witness and stated by him/her to be correct.

(vii) The evidence of the witnesses was not recorded verbatim.

(viii) The record does not show that the charge was explained to the plaintiff except that it was only read.

(ix) Did not record in the notes that he had explained the consequences to the plaintiff who was found guilty.

(x) He found the plaintiff guilty for breach of discipline of the Inspector General of Police's Directive in that, the urine test confirmed to have contained 'Delta-9 Tetrahydrocannabinoid Carboxylic Acid', which the learned Ffederal counsel had conceded and was also admitted by the adjudicating authority himself as not being a scheduled drug under the Dangerous Drug Act 1952.

(xi) The Application Form To Confirm the drugs in the urine (exh P3) and signed by the laboratory assistant of Hospital Batu Gajah and which contained the result of the urine test states the urine does not contains morphine and the words 'mengandungi' and 'cannabis' which was printed on it has been deleted and remained deleted.

(xii) In meting out the sentence against the plaintiff, he took into account of an alleged previous misconduct which was not put to the plaintiff nor was the plaintiff given any prior notice or asked to explain, thereby giving no opportunity for the plaintiff to refute or explain the alleged previous misconduct.

(xiii) He made submissions in reply to the submission of the defending officer although the Regulations does not provide for the adjudicating authority to make such submission as he was merely the adjudicating authority. His reason for submitting in reply to the submission of the defending officer was because he was both the prosecuting officer and the adjudicating authority.

(xiv) He admitted that he did not record that he had explained to the plaintiff the consequences if plaintiff was found guilty but however he quickly changed his mind by saying he did explain to him but it was not reflected in the notes of evidence. [Note: At this stage, it is important to bear in mind that it was nine years ago when the enquiry was conducted when compared to the evidence of the adjudicating authority in this court on 18 July 2005 and therefore his evidence in court that he did explain to the plaintiff is questionable.]

(xv) He did not call the defending officer to attend the enquiry right from the very beginning of the enquiry although he had permitted the defending officer to defend the plaintiff because it was not provided in the Regulations and that it was up to his discretion as the adjudicating authority.

(xvi) It is an unwritten rule that the adjudicating officer can also act as a prosecuting officer as since he joined the police force there was no orderly room procedure.

FINDINGS OF THIS COURT

[11] This court is in agreement with the submission of learned federal counsel that it is not the function of this court in this proceedings where the plaintiff has challenged his dismissal to be null and void and of no effect to consider whether the procedure in taking his urine to the laboratory was properly carried out under the Dangerous Drugs (Treatment and Rehabilitation) Act 1983. The function of this court is limited to reviewing only the decision making process by the administrative authority, although the court may have to consider the facts set out, out of necessity while examining to see if there was any procedural unfairness.

[12] This court has reminded itself that it was not sitting in its capacity as an appellate court but was only exercising supervisory jurisdiction on the decision making process of the adjudicating authority as to whether all the fundamental procedures had been followed in arriving at its decision (see *Hamdan Ibrahim v Lembaga Tatertib Hospital Kuala Kangsar & Anor* [2001] 1 CLJ 342 at p 360; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Mohd Din Talip v Polis Diraja Malaysia* [2004] 4 CLJ 804).

[13] However, this court finds there are several fundamental flaws, namely, violation of the rules of natural justice and excess or want of jurisdiction which goes to the root of the decision making process thereby vitiating the decision. Some of the admitted fundamental flaws by the adjudicating authority under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 were obviously due to the misunderstanding or miscomprehension by the adjudicating authority of his role and function as an adjudicating authority in the Orderly Room enquiry.

[14] The Orderly Room enquiry is not a trial as in a normal court of law and was never intended to be (see *Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor* [2002] 3 MLJ 714).The function of the adjudicating authority in the Orderly Room enquiry is to examine the witnesses in support of the charge and record their evidence (see reg 6(3) of the Regulations). In addition, the adjudicating authority may question any witness at any time as provided under reg 6(7) of the Regulations but surely the Regulations did not give him the authority to act as the prosecutor and a judge as admittedly done in the instant case due to miscomprehension of his function. The adjudicating officer cannot take the role of a prosecuting officer in a normal court of law as he has no duty to establish the charge unlike a prosecuting officer in court. The duty of the adjudicating officer is to adjudicate and at the close of the case and after hearing the witnesses he is to make a finding whether there is a case made out against the officer, in the instant case, the plaintiff on the charge and if he finds that a case has been made out, the officer facing the disciplinary enquiry shall be called upon to state his defence. The adjudicating authority then shall record his finding on the evidence at the close of the defence case.

[15] Where the Regulations vouch safes to the plaintiff of his choice of having a police officer to represent him at the enquiry and if at the same time the same authority who had permitted the plaintiff to be represented by a police officer places unnecessary barriers to prevent the police officer's presence throughout the enquiry and right from the very beginning, the result must necessarily be unjust and prejudicial to the plaintiff and the representation would be ineffective and meaningless. This court cannot permit such sham kind of enquiry and the decision and travesty of justice to stand unrectified. It is the considered view of this court that once a police officer is permitted by the adjudicating authority under the Regulations to represent the plaintiff who is facing the disciplinary action, the process demands that the defending officer should be permitted to remain in the Orderly Room enquiry with the plaintiff right from the very beginning of the enquiry until its conclusion. If it is otherwise or it is at the mercy or whims and fancies of the adjudicating authority as it happened in the instant case, it will then defeat the whole purpose of the representation as envisaged by the Regulations and would make the representation worthless and to be of no effect.

[16] This court in reviewing the administrative decision of the disciplinary authority, in the instant case, the adjudicating authority will not travel outside its function under the guise of a reviewing exercise. However, this court will examine the propriety of the decision making process and the adjudicating authority cannot act as an over-eager prosecutor as in a court of law with the view to build up a case or supplement a weak case or bend in finding him guilty. If it is found that the adjudicating authority has carried out his function in this unauthorized fashion, then it would be excess or want of jurisdiction and consequently ultra vires the Regulations and the decision may have to be struck down as being substantive procedural unfairness.

[17] Consequently, and on the admitted breach of the Regulations which is to be read with reg 6(10) of the said Regulations, there is a clear breach of reg 5(1) in that if a defending officer is permitted to represent the plaintiff at the Orderly Room enquiry, there must be an effective representation at the whole enquiry and not at selected times or at the whims and fancies of the adjudicating authority as the representation is a continuing process in accordance with reg 6(10) of the said Regulations.

[18] As stated above, the function of the adjudicating authority at the Orderly Room enquiry is to examine, discover the truth and if necessary, question any witness at any time and then make his finding. He certainly cannot act as a prosecuting officer to establish the charge or a case against the plaintiff. The role of the adjudicating authority should not be misunderstood or misread as that of a prosecuting officer in a criminal trial or in a court of law even assuming he is authorized to act as a prosecuting officer which is not the case in the instant case as it is not provided in the Regulations. His function is not to establish the charge but to examine the evidence and to make a finding. In the instant case, there is a clear admitted breach or excess of jurisdiction on his function as the adjudicating authority. An adjudicating authority should also not take sides by being a judge and a prosecuting officer as this would be open to severe criticism of biasness.

[19] Public interest demands that justice be provided impartially and with candour as punishment of dismissal affects a person's livelihood. This court is of the view that, with respect to the adjudicating authority, the making of the assumption that he could act as a prosecuting officer, in addition to being the adjudicating authority and to reply to the submission on the ground that there is no procedure as to how the Orderly Room enquiry is to be conducted, the adjudicating authority has been led along a line of reasoning which is unsound and ought to be rejected. Where in this instant case, the adjudicating authority had mistakenly assumed the function of prosecutor, it would have been very difficult for him to disentangle his independent opinion or separate out in his mind anything which ought not to have been taken into account.

[20] No man can be a judge in his own course governs the law on the concept of impartiality of justice and is an intrinsic requirement of the administration of justice and is equally applicable to a decision making process by an administrative tribunal. The decision of bias of court or impartiality on the part of the adjudicating authority would be regarded as a nullity and the inquest coram non judis (see *Vassiliades v Vassiliades* AIR 1945 PC 38). In order to secure justice is done, the idea of justice contemplates at least an independent impartial and non partisan judge. Due process is that which comport with the deepest notions of what is fair and right and just (see *Solevee v Balkom* 330; US 9 (1950)).

[21] The charge of an alleged previous misconduct was not properly before the adjudicating authority. Therefore, there is a clear breach of the rules of natural justice especially when it involves the deprivation of a livelihood. The adjudicating authority cannot allow the enquiry to start ex-parte and impose the punishment ex-parte after taking into account an alleged previous misconduct which was not properly before him as happened in the instant case where the adjudicating authority took into account behind the plaintiff's back an alleged previous misconduct (see *Shamsiah bte Ahmad Sham v Public Services Commissions, Malaysia & Anor* [1990] 3 MLJ 364; *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308; *Subry Hamid v Husaini Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229).

[22] In *Delhi Transport Copr DTC Mazdor Congress & Ors* (1991) Supp 1 SCC 600 at p 717, Satwan J when delivering the majority decision of the Supreme Court said at p 717:

> The right to life includes right to livelihood. The right to livelihood therefore cannot hand on the fancies of individual in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them.

[23] Justice is not ensured by the surprise attack against the plaintiff by having taken into account the alleged previous misconduct of the plaintiff. The concealment of the evidence until the punishment was meted out is a clear breach of the rules of natural justice. If the defending officer had in his mitigation raised that the plaintiff

had a clean record, it was only appropriate at that stage for the adjudicating authority to point out to the defending officer that there was an alleged previous misconduct but this did not happen and therefore raises doubt in the bona fide of the adjudicating authority in carrying out his function impartially. Nothing can undermine the certainty of justice as a lack of impartiality. A

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[24] The observance of the rules of natural justice was necessary for a just decision based on the facts and circumstances of this case and considering the framework of the procedure set out in the Regulations under which the enquiry was held (see *Suresh Koshi George v University of Kerala* AIR 1969 SC 198). In the instant case, the established rules of natural justice has been transgressed and this court has to interfere in the decision making process. Fairness dictates that the adjudicating authority cannot taken into account the previous alleged misconduct or any information supplied to him behind the back of the plaintiff on the basis of evidence or documents, the plaintiff or the defending officer cannot see unless it was first put to the plaintiff and he be given an opportunity to explain or contradict that information (see *Subry Hamid v Husaini Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229). C D

[25] Rules of natural justice are devised for ensuring fairness and promoting satisfactory decision making and its non-observance invalidates the exercise of power. Accordingly, any decision made in violation of the principles of natural justice is null and void and any lip service done to the principles of natural justice would not fulfill the said requirement (see *Suwarna Transport Co Ltd, Appellant v Appellate Authority* AIR 1956 Nag 235; *Johnson & Co (Building) Ltd v Minister of Health* [1947] 2 All ER 395). In order to conform to the principles of natural justice, it is required that the party must be given a fair opportunity to controvert, correct or comment on the facts which may affect the decision (see *De Verteuil v Knaggs* (1918) AC 557; (1985) 159 CLR 550; *Kiau v West* (1985) 159 CLR 550). E F

[26] Had the adjudicating authority not taken into consideration the previous alleged misconduct which was not properly before the adjudicating authority when the punishment was meted out against the plaintiff, to wit dismissal, there is a possibility that the adjudicating authority may have in lieu of the dismissal cautioned and discharged the plaintiff as provided under reg 6(10) or even reprimanded him. Even on the assumption that the adjudicating authority was right in finding the plaintiff guilty on the charge, the decision is still flawed for failure to comply with the rules of natural justice as referred above and the procedural irregularity which were incurable and the excess or want of jurisdiction. G H

[27] On the facts, the charge which is the basis of the Orderly Room enquiry appears to be ambiguous in view of the conflicting findings by the hospital laboratory at Batu Gajah and the chemist report. In fact, rightfully the entire case appears to be a non starter because the alleged drug which was found in the urine of the plaintiff namely 'Delta-9 Tetrahydrocannabinoid Carboxylic Acid' was first, according to the adjudicating authority and the learned federal counsel, not a scheduled drug under the Dangerous Drug Act 1952. Secondly, the Form To Confirm the drugs in the urine (exh P3) which was relied on in support of the charge states the urine did not contain morphine and the word 'mengandungi' and 'cannabis' were also deleted I

which obviously tends to show that no drugs were found in the urine especially cannabis which is the subject matter of the charge. As stated above, there appears to be a contradiction between the chemist report which states the urine contained 'Delta 9 Tetrahydrocannabinoid Carboxylic Acid' and the report from the medical laboratory Hospital Batu Gajah which states no drugs were found in the urine. There is also the possibility that had the adjudicating authority correctly taken into accounts the contents of exh P3 and having found no drugs in the urine, the plaintiff may not have been found guilty of the charge which would then appear to be groundless, in view of the conflicting findings by both the hospital laboratory Batu Gajah and the chemist report and the admission by the adjudicating authority and the learned federal counsel who was originally handling this case that 'Delta 9 Tetrahydrocannabinoid Carboxylic Acid' is not a scheduled drug as well.

[28] The rules of natural justice are basically to ensure fairness and impartiality. The two rules play an important function not only to judicial proceedings but to administrative proceedings as well. The rule is expressed through Latin maxim which states; 'Audi alteram partem (hear the other side); and 'Audicatur el altera pars (no man should be condemned unheard). A denial of fair enquiry is a denial of justice and one of the contents of natural justice which is so much valued is the guarantee of a fair enquiry or trial to an accused person. A fair enquiry and a fair decision are both closely interlinked and neither one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases is bound to lead to the sacrifice of the other (see *Krishna Murthy v Abdul Subban* (1965) 1 Cr LJ 565 at p 576).

[29] In *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169, Lord Denning said at pp172–173:

> The question is whether the hearing by the adjudicating officer was vitiated by his being furnished with that Report without Inspector Kanda being given any opportunity of correcting or contradicting it. Much of the argument before their Lordships and indeed before the Courts in Malaya proceeded on the footing that this depended on this further question: Was there a 'real likelihood of bias', that is, 'an operative prejudice, whether conscious or un-conscious', on the part of the adjudicating officer Mr.Strathairn against Inspector Kanda? The well known line of cases were cited from *The Queen v Rand* (1868) LR 1 QB 230 to *Regina v Camborne Justices* [1955] 1 QB 41; [1954] 3 WLR 415; [1954] 2 All ER 850. Adopting this test, much effort was devoted to showing that Mr Strathairn was not biased against Inspector Kanda. Thus he had not adopted the specimen charge drafted for him by his superior officer Mr Yates but had framed lesser charges of his own. And he deliberately refrained from calling the two accused men as witnesses because he realized that their evidence might be prejudicial to the accused. He only called them at a later stage because Mr Yates directed him to do so. The trial judge, Rigby J; was not persuaded by these arguments. He held that there was a very real likelihood of bias. But all the members of the Court of Appeal thought otherwise. They held that there was no real likelihood of bias. So Inspector Kanda failed on that way of looking at the case.
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> In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twins pillars supporting it. The Romans put them in two maxims: *nemo judex in causa sua*; and *audi alteram partem*. They have recently been put in the two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present

case, Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right on the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* (1911) AC 179, p 182; 27 TLR 378 down to the decision of their Lordships in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive presentations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side had access to the Judge without his knowing. Instances were cited to their Lordships were Re Gregson (1894) 70 LT 106; *Rex v Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109 and *Goold v Evans* (1951) 2 TLR 118 9 to which might be added *Rex v Architects Registration Tribunal* [1945] 2 All ER 131; 61 TLR 445 and many others.

Applying these principles their Lordships are of the opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words 'In my view, furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, couples with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, to my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal'. The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations shows that it is necessary for him to have them. He will read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the Report of the Board of Inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice (see *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 at p 154).

[30] Where the fairness of the procedure adopted is sufficiently raised and challenged then all matters relevant thereto were put in issue without the need for a further specific plea in that respect. (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308). There is in evidence that at no time was the plaintiff informed or afforded an opportunity to explain or comment on the alleged previous misconduct of which the adjudicating authority had taken into consideration in meting out the punishment of dismissal against the plaintiff. In fact, it is a case of the adjudicating authority having taken into consideration matters behind the back of the plaintiff which is a clear breach of the rules of natural justice where it is grossly unfair and against the charge.

[31] This court is satisfied that this is a clear case of breach of procedural unfairness and excess of jurisdiction which justified intervention by this court in the decision making process which had resulted in the dismissal of the plaintiff and warrants quashing of the decision of the adjudicating authority. On the grounds referred to above, where it is considered individually or in its totality, this court is of the view

the finding of guilt by the adjudicating authority had been vitiated by the said breaches which were gravely prejudicial to the plaintiff.

[32] The function of this court is limited to reviewing the decision of the adjudicating authority. However, if it is found that there is a basis of the adjudicating authority having acted ultra vires, unfairly or even unjustly, in the process of arriving at its decision, then it is the duty of this court to interfere with the decision which the adjudicating authority had arrived at against the plaintiff and this does not necessarily usurp the function of the adjudicating authority as there is procedural impropriety or unfairness to the plaintiff. This is the essence of judicial duty. However, this court is not insisting the administrative tribunal or the adjudicating authority who had held the enquiry not so much to act judicially but to act fairly, justly, reasonably and impartially (see *General Medical Council v Spackman* [1943] AC 629; *Triambak Pati Tripathi v BHS Education Allahabad* AIR 1973 All 1; *State Bank of Patiala v SK Sharma* AIR 1996 SC 1669; *Scmidst v Secretary of State of Home Affairs* [1969] 2 ChD 149 at p170). Nevertheless, this court cannot permit the Orderly Room enquiry to be conducted in such mechanical fashion.

[33] In this case, there is also breach of the reg 6(4) of the said Regulations. There were specific breaches in the Orderly Room enquiry as laid down in the Regulations and the unfair treatment. In accordance with reasons and justice, this court finds on the fact and circumstances in the instant case, there was in fact a breach of procedural fairness, procedural impropriety and a breach of the rules of natural justice which had resulted in vitiating the Orderly Room enquiry (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308; *Shamsiah bte Ahmad Sham v Public Services Commissions, Malaysia & Anor* [1990] 3 MLJ 364; *Subry Hamid v Husaini Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors* [1997] 2 MLJ 454; *Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor* [2001] 2 MLJ 257).

[34] In the circumstances and for the reasons advanced in this judgment, the plaintiff's claim is allowed. Accordingly, judgment is entered in terms of the declaration sought by the plaintiff in the statement of claim, namely prayers:

(b) A declaration that the plaintiff's dismissal from the Royal Malaysian Police Force is against the established rules of natural justice.

(d) A declaration that the dismissal of the plaintiff from the Royal Malaysian Police Force by the 1st defendant on 30.3.1996 is null and void, ineffective and of no effect and that the plaintiff is still a member of the Royal Malaysian Police;

(e) An order that an account be taken of all salaries, emoluments and other benefits the plaintiff is entitled to and same be paid to him forthwith.

[35] The punishment imposed on the plaintiff is null and void and is of no effect. Both parties are to determine the plaintiff's entitlement to his salaries and other emoluments as prayed in the prayers, failing which the Registrar of this court is

ordered to hold an inquiry to decide on the salary adjustment and arrears. The defendants are ordered to pay the costs of this suit.

Plaintiff's claim allowed.

Reported by Peter Ling